

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2009

STATE OF TENNESSEE v. AARON E. HOPSON

Appeal from the Criminal Court for Sullivan County
No. S55,247 R. Jerry Beck, Judge

No. E2008-02749-CCA-R3-CD - Filed February 18, 2010

The Defendant, Aaron E. Hopson, pled guilty to one count of possession of one-half ounce or more of marijuana with the intent to sell or deliver, a Class E felony, and received an agreed sentence of fifteen months, as a Range I, standard offender, with the manner of service left to the discretion of the trial court. Following a sentencing hearing, the trial court denied the Defendant's request for alternative sentencing and ordered the sentence to be served in the Department of Correction. In this appeal as of right, the Defendant contends that the trial court erred in denying alternative sentencing. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. MCMULLEN, J., joined.

Richard A. Spivey, Kingsport, Tennessee, attorney for appellant, Aaron E. Hopson.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph E. Perrin, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

At the December 10, 2008 alternative sentencing hearing, the twenty-seven-year-old Defendant acknowledged that he had a sale of cocaine case pending in Virginia, which involved his selling cocaine to a confidential informant who was also a childhood friend of the Defendant. The trial court also found that the Defendant had a history of criminal convictions including public intoxication, driving under the influence, and consuming

alcohol on school premises. As a juvenile, the Defendant had adjudications involving theft, aggravated assault, and failure to appear in addition to some alcohol-related offenses. The trial court also noted that the Defendant had already been charged in Virginia for the cocaine offense and had a pending domestic assault case from Washington County when the instant offense occurred.

The record further reflects that the Defendant had a sporadic employment history at various fitness centers. During the preparation of the presentence report, the Defendant tested positive for hydrocodone and was asked by his probation officer to submit proof of a lawful prescription, which the State alleged at the hearing the Defendant failed to do. Instead, the Defendant produced a pharmacy record of his prescription without any acknowledgement from a physician that the hydrocodone was lawfully prescribed.

The Defendant testified and explained that the positive drug screen stemmed from his taking Lortab for a rotator cuff injury under the treatment of a physician. The Defendant testified that he had a “troubled youth” beginning with the murder of his step-father when he was eight years old. He also stated that he began treatment for anger issues at the age of five when his biological father abandoned the family. He reported part-time employment with an athletic store and some work training student athletes. The Defendant attributed his present charge as well as the one in Virginia to his desire to help a friend in trouble and denied that he ever used drugs.

On cross-examination, the Defendant admitted that the instant offense involved his selling a quarter pound of marijuana. He denied telling investigators that he had been selling drugs since he was fifteen-years-old. He did admit, however, that the instant case and cocaine case from Virginia were not the only times he had sold drugs – admitting that he had sold up to a pound of marijuana in the past. He also admitted to using illegal steroids.

In its determination of sentencing, the trial court commented that it initially reviewed the presentence report in the case and “thought the Defendant was probably on the bubble in regards to . . . Community Corrections.” However, the trial court further commented upon its consideration of the Defendant’s truthfulness and stated:

The Court finds him to be a totally uncredible witness. . . . The Defendant has been involved in drugs other than this offense of marijuana. He evidently had been for some time by his own admission selling good-size quantities . . . of marijuana. . . .

He has a lengthy juvenile record which if he had been an adult he could have received a sentencing in the prison or the county jail.

I don't trust him. An[d] if I put [an] order of probation or alternative sentencing down of any kind the Court would have to have confidence he would not commit new crimes. And on his testimony – he's lost the case on his own testimony.

Following its comments, the trial court denied all forms of alternative sentencing and ordered the sentence to be served in incarceration.

ANALYSIS

The Defendant contends that the trial court erred in three distinct ways in imposing his sentence: (1) denying probation, (2) denying community corrections, and (3) failing to consider mitigating factors in its determination of his sentence. The State argues that the Defendant failed to establish his suitability for probation or community corrections given his lack of candor with the trial court regarding his involvement in the sale of illegal drugs and his failure to correlate any alleged alcohol abuse with the convicted offense to establish his particular suitability for community corrections. The State also cites to State v. Carter, 254 S.W.3d 335, 343-44 (Tenn. 2008) for its position that the weight afforded enhancement and mitigating factors is no longer reviewable on appeal.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for the purpose of meaningful appellate review:

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated

and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn.1986).

The Defendant is a “standard offender convicted of a Class C, D, or E felony, [who] should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-30-102(6)(2006). Furthermore, a defendant is eligible for probation “if the sentence actually imposed upon the defendant is ten (10) years or less,” and the trial court is required to automatically consider probation as a sentencing option. Tenn. Code Ann. § 40-35-303(a), (b)(2006). A defendant’s potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5). A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956)), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant’s criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978).

Relative to its denial of full probation, the trial court noted the Defendant’s history of juvenile adjudications that would have resulted in incarceration as an adult. The trial court expressed significant concern over the Defendant’s lack of candor concerning his involvement in the sale of illegal drugs. The trial court correctly found that these facts weighed unfavorably towards the Defendant’s potential for rehabilitation. See, e.g., State v. Nunley, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999). The trial court’s comments indicate a concern with the Defendant’s potential for rehabilitation and likelihood to re-offend. We conclude that the trial court gave appropriate consideration to the sentencing

factors in arriving at its determination. Accordingly, we conclude that the trial court properly denied alternative sentencing in this case.

As to the trial court's denial of community corrections, a defendant may qualify for community corrections based upon the special needs provision found at Tennessee Code Annotated section 40-36-106(c) which provides that:

Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol or drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under this chapter.

The trial court failed to make any specific findings regarding the Defendant's suitability for community corrections and instead denied all forms of alternative sentencing in its findings. Although defense counsel argued that the Defendant should be considered a candidate for community corrections under the special needs provision in light of his alleged history of alcohol abuse, the Defendant attempted to mitigate his involvement in the instant offense (and others) by characterizing his actions as undertaken to help out a friend. Furthermore, the Defendant presented no proof regarding his alleged mental health issues or alcohol abuse issues. Under these circumstances, we conclude that the Defendant was not a suitable candidate for community corrections. See State v. Boston, 938 S.W.2d 435, 439 (Tenn. Crim. App. 1996).

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE